

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2015] NZIACDT 43

Reference No: IACDT 025/14

IN THE MATTER

of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

**Rajapaksha Senadipathi and Jeewani
Xavier**

Complainants

AND

Eduardo Maala Sampang

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainants: Mr A McClymont, Lawyer, McClymont & Associates, Auckland..

Adviser: In person

Date Issued: 20 April 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] The complaint is that Mr Sampang accepted instructions and received a fee to assist the complainants with a request for a visa. The allegations are that he:
 - [2.1] Failed to comply with the requirements to commence a professional relationship. He had no written agreement, and did not attend to the various disclosure requirements.
 - [2.2] He offered one of the complainants employment, and said that would allow her to qualify for a work visa. The employment was not satisfactory to qualify for a work visa.
 - [2.3] The application for a visa failed, and Mr Sampang advised one of the complainants to continue to work for him; it was unlawful for her to do so.
 - [2.4] He then failed to record his advice in writing.
- [3] Mr Sampang has not responded to the complaint with an explanation or justification addressing the grounds of complaint.
- [4] The Tribunal has concluded it must uphold the complaint, as the material before it establishes the allegations against him, and they constitute serious breaches of his professional obligations.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
 - [5.1] The female complainant (the complainant) approached Mr Sampang to assist with her immigration issues. She was in New Zealand with a current open work visa, and sought assistance with a student visa application. Mr Sampang suggested that instead she should apply for a work visa, and his practice would employ her as an office manager in Timaru. She had to relocate to take up that employment.
 - [5.2] On 4 February 2013, the complainant signed an employment for the position in Timaru. On 15 February 2013, Mr Sampang advertised the position in the New Zealand Herald newspaper. On 27 February 2013, Mr Sampang submitted a visa application based on her meeting the essential skills work visa criteria. Mr Sampang said in the application form that he had advertised; but only provided evidence of registering the position with Work and Income New Zealand (WINZ).
 - [5.3] The complainant paid \$5,000 for Mr Sampang's services, but there was no written agreement.
 - [5.4] Immigration New Zealand reviewed the application, and noted the WINZ registration was for a position in Auckland not Timaru and that was the extent of the evidence of advertising. Furthermore, an industry standard salary for the office manager position was between \$53,000 and \$75,000; and the proposed salary Mr Sampang offered of \$37,500 was below that rate.
 - [5.5] Mr Sampang responded saying the position was in Auckland, and this was a relocation, and if he paid more than the minimum wage that was sufficient.
 - [5.6] Immigration New Zealand declined the complainant's application, as the salary was below the industry standard and Mr Sampang had not made genuine attempts to recruit New Zealand citizens or residents.
 - [5.7] As a result, the complainant was in New Zealand unlawfully, and had 42 days to lodge an appeal, if she chose to do so. She continued to work for Mr Sampang, and he told

her that was not a problem. On 16 May 2013, Mr Sampang submitted a request for a work visa for the complainant under section 61 of the Immigration Act 2009; he did not enter into a written agreement for that service. Immigration New Zealand declined the request on 21 May 2013.

- [5.8] Mr Sampang discussed the complainant's options with her on 21 May 2013, but he did not record the discussion in writing. In July 2013, the complainants terminated Mr Sampang's services.
- [6] The Registrar identified potential infringement of professional standards during the course of Mr Sampang's engagement, the allegations were:
- [6.1] That Mr Sampang breached clause 1.5(a), (b) and (d); and 8(b) and (c) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). Those provisions required Mr Sampang to have written terms of engagement, explain all relevant matters, and have his clients confirm in writing they accepted the terms. Further, before commencing work incurring costs he was required to set out his fees and disbursements, and the payment terms and conditions. The circumstances were:
- [6.1.1] Mr Sampang provided immigration services to the complainant, including the preparation and submission of an essential skills work visa application, and a request for a work visa under section 61. He received \$5,000 for those services.
- [6.1.2] Mr Sampang did not enter into a written agreement regarding the services he was to provide, he did not get acceptance in writing, and did not set out the fees and payment terms in advance.
- [6.1.3] Mr Sampang accordingly breached the identified clauses in the 2010 Code.
- [6.2] That Mr Sampang breached clause 1.1(a) of the 2010 Code, as he failed to perform his services with due care, diligence, respect and professionalism. The circumstances were:
- [6.2.1] The preparation and submission of the application for a work visa was defective, as:
- [6.2.1] The relevant immigration instruction WK2.10.1 required the employer to make a genuine attempt to recruit a New Zealand citizen or resident before the position could qualify under the instruction.
- [6.2.1] Mr Sampang (also the employer) only provided evidence of registering the position with WINZ in Auckland, and did not take appropriate steps in Timaru where the position was located.
- [6.2.1] Mr Sampang did not exercise due care, diligence, respect and professionalism, through his failure to ensure he met the requirements of the Immigration Instructions.
- [6.2.2] His advice after the application for the work permit was declined was wrong as:
- [6.2.2] When Immigration New Zealand notified Mr Sampang the complainant was in New Zealand unlawfully, and had 42 days to lodge an appeal; he told her she had 14 days to re-apply for a visa.
- [6.2.2] He told her she could continue working for him.
- [6.2.2] Mr Sampang did not exercise due care, diligence, respect and professionalism, as he failed to advise the complainant of the seriousness of the situation, and that she could no longer work, as she did not hold a work visa.

[6.3] That Mr Sampang breached clause 3(f) of the 2010 Code, as he failed to maintain professional business practices in relation to confirming details of material discussions with clients. The allegations were:

[6.3.1] When Immigration New Zealand declined the complainant's request for a visa under section 61, he advised her of her options; but failed to confirm the advice in writing.

[6.3.2] He accordingly failed to comply with his obligation to record details of a material discussion with his client.

The responses

[7] Mr Sampang did not file a statement of reply; he was not required to do so if he accepted the contents of the Statement of Complaint.

[8] The complainants did file a statement of reply. They agreed with the contents of the Statement of Complaint.

Discussion

The standard of proof

[9] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The facts

[10] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.

[11] The facts are uncomplicated, and essentially rely on the documentary record the Registrar presented to the Tribunal. It is clear Mr Sampang failed to document his terms of service, lodged a defective application, failed to deal with Immigration New Zealand's concerns; and then gave wrong advice and failed to confirm advice in writing. The facts founding the complaint are evident in the record, and Mr Sampang has not disputed the allegations. I accordingly find the factual basis for each of the grounds of complaint made out.

Failure to document the client engagement process

[12] I am satisfied the complaint that Mr Sampang failed to comply with clauses 1.5(a), (b) and (d), and 8(b), (c) and (e) of the 2010 Code are established. Mr Sampang simply failed to have a written agreement, failed to explain the essential matters that were to be in the agreement, failed to get his clients confirmation in writing, and did not set out his fees and related matters before commencing work. It appears the made no attempt to comply with the 2010 Code in those respects.

[13] The provisions are mandatory, and Mr Sampang has provided no justification for his failure to comply. Accordingly, I am satisfied he breached clauses 1.5 and 8 of the 2010 Code in the respects alleged in the Statement of Complaint.

Failure to lodge a complying application

[14] The complainant came to Mr Sampang seeking a student visa; he dissuaded her from that course and offered her employment in his own practice. Accordingly, he put his client into the vulnerable position of being both his employee, and client.

[15] Mr Sampang was in control of the position of employment required for the complainant to apply successfully for a visa. He expected his client to relocate from Auckland to Timaru, give up the opportunity of applying for a student visa, which she originally sought; if the application failed, she would be in New Zealand unlawfully. In short, he held out a course of action, had control over it; and if it failed his clients would be in a very difficult position.

- [16] The complainant's life in New Zealand was very dependent on Mr Sampang. He had a correspondingly high duty to act professionally. Instead, his conduct was at the level of gross negligence. Immigration New Zealand has set clear and high standards as to what is required to establish that a position of office manager qualifies under the immigration instructions. An obvious issue was a proper process to establish a New Zealand citizen or resident was not available to fill the position. Mr Sampang had to advertise it properly. The level of salary was important. Immigration New Zealand will not accept a position genuinely cannot be filled if potential applicants are dissuaded by offering less than market pay.
- [17] Mr Sampang's failure to advertise locally and to claim he could pay the minimum wage for the position was grossly negligent. Furthermore, paying below a market level raises concerns of exploitation of a client. However, that is not one of the elements in the complaint, and accordingly I only take account of the level of pay in relation to meeting the requirements of the immigration instruction.
- [18] In short, the application Mr Sampang prepared could not succeed and it did not succeed. When Immigration New Zealand identified its shortcomings Mr Sampang he did not rectify them, instead he claimed Immigration New Zealand was wrong about the obvious failures.
- [19] The result was that the application necessarily failed, his client was put in the position of being in New Zealand unlawfully, and having to leave New Zealand because of Mr Sampang's conduct.
- [20] When Mr Sampang realised his client was in New Zealand unlawfully he had to provide advice to his client. At that point, he should have accurately identified why her application failed, informed her she should consider taking independent advice (because it was his fault), and explained that she was now in New Zealand unlawfully, subject to enforcement action and had limited options to challenge the decision. Furthermore, he had to advise her of the importance of leaving New Zealand.
- [21] Instead, he told her she should continue to work, and the situation was readily fixed. She could not lawfully work, and Mr Sampang in providing that advice breached his professional obligation to comply with New Zealand immigration law.
- [22] Accordingly, I am satisfied Mr Sampang failed to exercise due care and professionalism as the application he arranged and submitted to Immigration New Zealand was grossly defective when filed, and his response when Immigration New Zealand pointed out the difficulties was equally deficient. Then the advice he provided when the application failed was unprofessional, he encouraged his client to break New Zealand law and assisted her to do so.
- [23] I am satisfied Mr Sampang breached clause 1.1(a) of the 2010 Code in those respects.

Failure to confirm instructions in writing

- [24] When Mr Sampang failed to rectify the position with a request pursuant to section 61, he had an obligation to provide advice to his client. He was obliged to repeat the advice discussed in paragraph [20] above; he gave advice, however he failed to confirm in writing what advice he gave.
- [25] He was required to confirm his advice in writing, and his failure to do so resulted in a breach of his obligations under clause 3(f) of the 2010 Code.

Decision

- [26] The Tribunal upholds the complaint pursuant to section 50 of the Act; the breaches of the 2010 Code I have identified are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [27] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

- [28] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Mr Sampang is entitled to make submissions and respond to any submissions from the other parties.
- [29] Mr Sampang should understand the gravity of the findings against him. He was advising a vulnerable migrant, he took it upon himself to advise on a course of action she had not initiated. His performance of his professional work was grossly deficient, and placed her in an invidious position. He then advised and encouraged his client to breach New Zealand's immigration law, and facilitated her doing so. His conduct goes to his fitness to be a licensed immigration adviser; his submissions should address that concern.
- [30] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.
- [31] The Tribunal requests the Registrar pursuant to section 49(4), to report on the extent to which Mr Sampang has complied with previous orders the Tribunal has imposed in respect of sanctions, and the steps she has taken to enforce the orders.

Timetable

- [32] The timetable for submissions will be as follows:
- [32.1] The Authority and the complainants are to make any submissions within 10 working days of the issue of this decision. The Registrar is requested to also report in that time, if practicable and if not indicate when she can do so.
- [32.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [32.3] The Authority and the complainants may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at Wellington this 20th day of April 2015

G D Pearson
Chair